U.S. Department of Labor

Board of Alien Labor Certification Appeals
1111 20th Street, N.W.
Washington, D.C. 20036

Date: **March 3, 1999**
Case No. **1997-INA-218**

In the Matter of:

DAISY SCHIMOLER,
Employer,

on behalf of

MARIA FANNY BARSA,
Alien.

Certifying Officer: Dolores Dehaan
New York, New York

Appearances: Sam S. Matthews, Esquire[1]

Geoffrey S. Stewart, Esquire
for Employer

Before: Burke, Guill, Holmes, Huddleston, Jarvis, Lawson, Neusner, Wood and Vittone
Administrative Law Judges

JOHN M. VITTONE
Chief Administrative Law Judge

DECISION AND ORDER

This case arises from Employer's request for review of the denial by a U.S. Department of Labor Certifying Officer ("CO") of alien labor certification for the position of Domestic Cook, Cuban

[1] The record does not contain a Notice of Appearance by Mr. Matthews. Accordingly, it is not clear whether he is representing Employer, the Alien, or both.

Style.[2] The CO denied certification on the ground that Employer failed to establish that the responsibilities assigned to the cook on a daily basis are not sufficient to establish permanent full-time employment. The Board has considered this matter *en banc* to clarify the application of the definition of employment found in 20 C.F.R. § 656.3 to domestic cook cases.

STATEMENT OF THE CASE

Employer, Daisy Schimoler, filed an application for alien labor certification on April 19, 1995 for the position of "Cook, Cuban Style Live-Out." (AF 5). The position was advertised in The Daily Record for three days in January 18, 1996, (AF 34-36) and the advertisements generated no responses. (AF 37).

The CO proposed to deny certification in a Notice of Findings ("NOF") dated July 15, 1996. (AF 43-45). The CO concluded that it did not appear feasible that duties related to cooking would constitute full time employment in the context of Employer's household.[3] The NOF indicated that Employer could rebut by "amending the job duties" or submitting evidence that the "requirement" arises from business necessity. The CO also detailed a number of matters concerning which Employer should provide documentation, such as Employer's past practices in hiring domestic cooks, who will be cooked for, who will be providing housekeeping and childcare services, and the schedules of family members.

Employer submitted her rebuttal on August 15, 1996, explaining why she requires the services of a full time cook in her household, and enumerating the duties of the cook to clarify and illustrate that the duties are in the nature of full-time employment. (AF 46-52). Ms. Schimoler's reason for seeking to employ a cook is to free herself for her other duties as a housewife and a mother of two young children. Ms. Schimoler stated that the cook will prepare three daily meals for her husband, her children, herself, and occasional guests for lunch and dinner. She provided a statement of the expected time necessary to prepare meals and buy foodstuffs, and stated that the worker would not be required to perform non-cooking duties. She stated that in the past, she and her husband had used an independent contractor to provide meal services in the home, and that she employs an independent contractor for general house cleaning. Ms. Schimloer also submitted that, at present, she asks a worker to provide cooking services from time to time.

---

[2] Permanent alien labor certification is governed by section 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(5)(A), and Title 20, Part 656 of the Code of Federal Regulations ("C.F.R."). Unless otherwise noted, all regulations cited in this decision are in Title 20. We base our decision on the record upon which the CO denied certification and Employer's request for review, as contained in the appeal file ("AF"), and any written arguments. 20 C.F.R. 656.27(c).

[3] Early in the processing of the application, the local job service required Employer to submit a statement of business necessity for excessive hours or annotate the rest periods, because the ETA750A indicated an eleven hour day. (AF 26).

Ms. Schimoler stated that her husband works from 8:00 am to 7:30 pm, on a good day; that she is involved in many business projects, community work, and public affairs, although her schedule is not like her husband's; that the children are pre-school age; and that when she and her husband are not home, they hire a nanny to look after the children. Ms. Schimoler provided a statement from a prior employee, stating that she worked for Ms. Schimoler as a cook of Cuban food from March 1990 until November 1995, with a weekly salary of $200.00 in cash, for 50 hours a week.[4] (AF 48). Ms. Schimoler also provided a statement from another worker indicating that she has worked as an independent contractor housekeeper for Ms. Schimoler since January 2, 1994, with a rate of pay of $150 cash per week for three days of work. (AF 47).

On August 23, 1996, the CO issued a Final Determination denying certification. (AF 53-55). The CO noted that the NOF was based on an observation that "it did not appear possible that [cooking and related food preparation] duties constituted full-time employment in the context of employer's household." The CO concluded, in essence, that the Employer's rebuttal was not credible to establish that the cook would be engaged in full-time work, given that in many similar households cooking is not a full-time pursuit, the apparent absence of Employer's husband from breakfast and lunch, that one and one-half hours of shopping per day appeared excessive, and that Employer did not provide documentation to support the statements of the independent contractors (such as a contract, receipts, or tax and social security report forms). The CO also noted the anomaly that Employer previously paid an independent contractor $200 per week for 50 hours of work, whereas she will pay the Alien $350 per week for only 40 hours of work. The CO concluded that "the responsibilities as indicated in the rebuttal for this household Cook on a daily basis are not sufficient to establish permanent full-time employment for the occupation in the context of the household described." (AF 53).

Employer requested review by this Board on September 25, 1996, and the Board received the Appeal file on March 10, 1997. (AF 65-66).

DISCUSSION

Today, in *Carlos Uy*, 1997-INA-304 (Mar. 3, 1999) (*en banc*), the Board finds that a Certifying Officer may correctly apply the *bona fide* job opportunity analysis of section 656.20(c)(8) of the Department's labor certification regulations when it appears that the job was misclassified as a skilled domestic cook rather an some other unskilled domestic service position, or where it appears that the job was created for the purpose of promoting immigration.

[4] We note that in her request for review, Ms. Schimoler states that in the past, caterers merely dropped off meals. (AF 66).

In the instant case, however, the CO did not refer to section 656.20(c)(8), but relied solely on the definition of employment in section 656.3[5] to deny certification on the theory that an employer must establish that the duties of the job will keep the worker occupied throughout a substantial portion of the work day before labor certification may be granted. We hold that the definition of employment in section 656.3 cannot be used to attack the employer's need for the position by questioning the hours in which a worker will actually be engaged in work-related duties.[6] Focusing solely on whether the employment will keep the worker substantially engaged throughout the day casts the problem in the wrong light -- the true issue being whether the employer has a *bona fide* job opportunity. It also produces a degenerative analysis where an employer is placed in a position where it can only rebut by trying to justify near to an eight hour a day schedule for a worker, and the CO is merely second guessing the employer's justifications with assumptions about what a typical family needs in the way of cooking.

In this application, Employer offered a 40 hour work week, with an 8 am to 5 pm schedule. In her rebuttal, she only listed duties comprising 5 1/2 hours a day, which the CO seized upon as a grounds for denial. But, for purposes of meeting the requirements of the regulatory definition of employment in compliance with section 656.3, we hold that there is little relevance in whether the worker's duties would require constant work for the entire work day, provided that the work day is customary for a full-time employee in the industry or under an employer's special circumstances.

The focus of the section 656.3 definition of employment is on whether the job is permanent versus temporary[7] and full-time versus part-time. If an employer offers, for example, only a 25 hour a week work week, then section 656.3 may be properly cited by the CO as a ground for denying labor certification. But where the employer is offering a work week with hours customary for a full-time employee in the industry, section 656.3 is not the proper ground for denying the application.

---

[5] The NOF and Final Determination cited section 656.50. This is an outdated citation, as the labor certification regulations have been reorganized, with the definitions section now appearing at section 656.3.

[6] The NOF was revealing in this respect, citing the definition of employment section of the regulations, but directing Employer to establish the "business necessity" of the requirement (evidently the requirement of a full-time worker). A showing of "business necessity" for the position itself under section 656.21(b)(ii)(2) may not be required by the CO. *See, e.g., Lebanese Arak Corp.*, 1987-INA-683 (Apr. 24, 1989) (*en banc*) (by implication); *Joon Sup Park*, 1989-INA-231 (Mar. 25, 1991). As delineated in *Carlos Uy, supra*, however, a CO may question whether the employer is presenting a *bona fide* job opportunity.

[7] *Compare Vito Volpe Landscaping*, 1991-INA-300, *et al.* (Sept. 29, 1994) (*en banc*) (although landscaping jobs might be "full time" during ten months of the year, and the need for these jobs occurs year after year, they cannot be considered permanent employment); *Gerata Systems America, Inc.*, 1988-INA-344 (Dec. 16, 1988) (*en banc*) (Employer violated § 656.3 when it did not establish that it had the ability to offer permanent, full-time employment).

That said, however, the lack of sufficient duties to keep a worker gainfully employed for a substantial part of a work week may be relevant to the issue of whether the employer is offering a *bona fide* job opportunity. If an employer appears to be mis-characterizing a job or to have created the job for purpose of assisting the alien's immigration, the CO may properly question the application under section 656.20(c)(8). Thus, for example, if the CO in the instant case suspects that Employer described a domestic cook position for purposes of having the job categorized as skilled labor to avoid limits on visas for unskilled workers – that Employer appears to actually be seeking a housekeeper or nanny with cooking duties -- she may require the employer to establish that a *bona fide* job opportunity is being offered. Such a citation of error, however, is gauged by the totality of the circumstances -- not just lack of sufficient duties to keep the worker occupied in cooking related work throughout the work day.

Citation of section 656.3 to question the nature of the position also gives an employer inadequate notice of what is really being questioned by the CO. Although the CO in the instant application cited only section 656.3, the NOF includes questions indicating that the CO suspected mis-classification of the position. Mis-classification of the position, however, should be addressed under section 656.20(c)(8), and an employer needs to be given notice of "precisely why the application does not appear to state a *bona fide* job opportunity." *Carlos Uy, supra* at 7.

Accordingly, this matter will be remanded for issuance of supplemental NOF for reevaluation of the application consistent with the discussion herein, and today's decision in *Carlos Uy, supra*.

On remand, the CO is directed to consider whether Employer's two years of experience in the job offered (*i.e*., cooking Cuban cuisine) is an unduly restrictive job requirement. *See* § 656.21(b)(2). We note that *Loews Anatole Hotel*, 1989-INA-230 (Apr. 26, 1991) (*en banc*), has been cited for the proposition that the Board will not consider issues not "preserved" by the CO in the Final Determination. *See, e.g.*, *Mr. & Mrs. Marc Cohen*, 1995-INA-150, slip op. at n.1 (Dec. 4, 1996). *Loews Anatole Hotel*, however, did not hold that an issue is forever waived if not cited in the Final Determination. Rather, in that case, the panel which first decided the case on review had relied on a regulation not cited in the NOF or the Final Determination. The full Board held that the panel erred because the record did not support the raising of the issue relied on by the panel. We hold that *Loews Anatole Hotel* does not preclude the Board from remanding a case for review by the CO of matters not previously considered in the NOF or the Final Determination.

ORDER

IT IS ORDERED that this matter is hereby **REMANDED** to the Certifying Officer.

JOHN M. VITTONE
Chief Administrative Law Judge

James Lawson, Administrative Law Judge concurring:

I concur except that I disagree with the last paragraph of the decision directing the CO to consider whether the Employer's experience requirement is unduly restrictive, and the text which distinguishes *Loews Anatole Hotel* and holds that it "does not preclude the Board from remanding a case for review by the CO of matters not previously considered in the NOF or the Final Determination." I think it should be fair to assume, on review, that NOF findings, not specifically discussed in the FD, have been considered by the CO and satisfied by the employer. The antithesis would muddy the focus of review, encourage fishing expeditions to find non-articulated bases to sustain denials of certification, impair administrative-judicial efficiency, raise questions of due process and cast uncertainty as to the scope of review. It seems clear that NOF findings not discussed in the FD have been satisfied.[1] The scope of review should not be re-defined without input and full consideration of that issue, which I believe is in itself appropriate for consideration and discussion at some other time in a separate decision where it is in issue. Here, the issue is gratuitously raised in circumstances which allow no input from the BALCA bar. I don't think this case should be the vehicle for such a pronouncement. Moreover there is no foundation in the body of the decision for this direction on remand.

Donald B. Jarvis, Administrative Law Judge, dissenting:

I dissent. The regulations provide that applications for alien labor certification under Part 656 of the Code of Federal Regulations are for "permanent employment." 20 C.F.R. 656.1 (a). Employment is thereafter defined as "permanent full time work by an employee for an employer other than oneself." 20 C.F.R. 656.3. Section 656.20(c) sets forth the information an employer must provide in the Application for Alien Employment Certification (Form ETA 750). In the light of the previously cited regulations it is implicit that the term "job offer" refers to permanent, full time employment.

The majority opinion, relying on *Carlos Uy III*, 1997-INA-304 (Mar. 3, 1999) (*en banc*), decided this day, relegates the question of full time employment to one element in a totality of circumstances test and forecloses its use as an independent consideration by the CO. This is incorrect and inconsistent with the regulations.

The totality of circumstances test relates to the question of whether there is a bona fide job opportunity and thus whether the job opportunity is clearly open to qualified U.S. workers. This issue is encompassed by Section 656.20(c)(8). It is separate and distinct from the issue of full time employment which is covered by Section 656.3. I agree with the discussion of Judge Huddleston in his

---

[1] See *BALCA Benchbook* at Chapter 26 III D and cases cited there: *Drs. Preisig & Alpern*, 1990-INA-35 (Oct. 17, 1990); *Loew's Anatole Hotel*, 1989-INA-230 (Apr. 26, 1991) (*en banc*); *Dr. Mary Zumot*, 1989-INA-35 (Nov. 4, 1991); *Barbara Harris*, 1988-INA-392 (Apr. 5, 1989) (*en banc*); *Hough International*, 1991-INA-24 (Mar. 18, 1991) (*per curiam*); *International Student Exchange of Iowa*, 1989-INA-261 (Apr. 21, 1992) (*en banc*); *Mr. & Mrs. Marc Cohen*, 1995-INA-150 (Dec. 5, 1996); *Gail Bratman*, 1994-INA-568 (Aug. 30, 1996); and *Hunter's Inn*, 1995-INA-278 (Feb. 19, 1997).

concurring opinion in *Carlos Uy III, supra*, on this issue. I have no quarrel with the use of full time employment as one factor in a totality of circumstances test on the question of whether there is a bona fide job opportunity. My disagreement with the majority opinion is that the adoption of the totality of circumstances test cannot foreclose the CO from challenging an application solely on the basis that it does not call for full time employment as required by Section 656.3.

The regulations call for full time employment, not full time pay for less than full time work. If we were not dealing with alien labor certification an employer could make any arrangement he or she chooses consistent with the wage and hour laws. Alien labor certification is an exception to the general operation of the Immigration and Nationality Act by which Congress favored treatment for a limited class of alien workers whose skills were needed in the U.S. labor market. "The purpose of labor certification under 8 U.S.C. § 1182(a)(14) is to exclude aliens competing for jobs American workers could fill and 'protect the American labor market from an influx of both skilled and unskilled foreign labor.' ... The grant of an exemption under 8 C.F.R. § 212.8(a) should not impair or sacrifice this objective of protecting the American job market from alien competition." *Wang v. Immigration & Naturalization Service*, 602 F. 2d 211, 213–214 (9th Cir. 1979) (footnote omitted) (citations omitted); *see also Pancho Villa Restaurant, Inc. v. U.S. Dept. of Labor*, 796 F.2d 596, 597 (2nd Cir. 1986); *Yin Tsang Cheung v. District Director*, 641 F.2d 666, 669 (9th Cir. 1981). Under the regulations, the CO has the right and duty to inquire whether the job offered constitutes full time employment as a separate issue. I disagree with the majority opinion and the portion of Judge Huddleston's concurring opinion which hold otherwise.

Section 656.21(b)(2)(i)(A) requires that the job opportunity's requirements, unless adequately documented as arising from business necessity shall be those normally required for the job in the United States. Normally, employers do not pay full time wages for less than full time work. Eccentric employers do not set the norm. Whatever suspicions may be aroused where the job does not call for full time work (e.g. that the employee may perform other duties not specified in the application) the CO should be able to avoid this collateral issue by denying certification on the basis that the employer has failed in its burden of proof to establish full time employment under Section 656.3.

In holding that full time employment is only an element in a totality of circumstances test the majority should be prepared to revisit and overrule numerous Board cases dealing with Home Tutors, Child Monitors, Landscape Gardeners and others.

In *Gary and Nancy Gee*, 1997-INA-108 (March 10, 1998), the Board denied alien labor certification, finding that the Employer failed to establish that the position of "Home Tutor" constituted permanent full time employment. The Board agreed with the CO's finding that the Employer inflated the hours for the position and stated, "we cannot accept the proposition that a tutor needs 20 hours to prepare lessons and review the work of only two pupils." The Employer had asserted that the tutor would work from noon to 9:00 p.m. spending the first three to four hours per day preparing and reviewing lesson plans and the later four to five hours teaching the children. *See also Ms. Ruth Hai*, 1993-INA-111 (June 9, 1994); *Dr. Marta De Pierris*, 1993-INA-525 (Sept. 15, 1994); *Miaofu Cao*, 1994-INA-53 (Nov. 29, 1994), *rev'd on other grounds* (Mar. 14, 1996) (*en banc*).

In *Joan Bensinger*, 1989-INA-52 (Oct. 30, 1989), the Employer filed for Alien Labor Certification for the position of "Child Monitor, Live-Out". The Employer asserted that the Alien would work a basic 40 hour work week. Upon review of the record, the Board was "not persuaded that the duties to be performed outside the presence of the child described by the Employer would occupy any significant part of the seven hours between 8:00 a.m. and 3:00 p.m., or could not be accomplished during the period from 3:00 p.m. to 5:00 p.m. daily." The Board held that the proposed employment does not constitute full time employment.

In *Vito Volpe Landscaping*, 1991-INA-300 (June 3, 1993) (*en banc*), the board definitively described the nature and content of full time employment for landscape workers. The issue to be determined in these cases was whether the Employer's proof established that the worker in the landscaping position historically works full time through out the year. The Board held that if these employers believed that they could qualify for permanent labor certification on the basis that they will employ the alien during the off season, they must answer the questions, "Is there really work requiring full time employment in the off season and if so, would this be an unduly restrictive combination of duties; or are U.S. workers put on paid vacation for this period (thereby taking the job out of the seasonal definition of 8 CFR section 214.2(h)(6)(ii)(B)(2))?" The Board held that the fact that these employers would again need employees in successive years after the off-season did not make the employer's needs permanent.

In *R.J. Landscape Design, Inc.*, 1996-INA-233 (Feb. 11, 1998), the Employer asserted that the gardening duties of the Landscape Gardener are performed for 10 months per year and the remaining months are spent making repairs to concrete and asphalt walks and driveways. The Board denied certification holding that: "Where the employer cannot provide any documentation of a full time position and where the type of work is typically seasonal work, the employer has not clearly established that a full time job opportunity exists and certification is properly denied." *See also Landscape Service Corp.*, 1997-INA-85 (Jan. 26, 1998) (The CO found the employer's argument and evidence unpersuasive and concluded based on the payroll information, it was impossible to determine whether the employees worked during the winter months.). Similarly, certification was denied in *Herman Moro Landscaping*, 1996-INA-332 (Dec. 4, 1997) despite a letter from a customer of the Employer verifying that its landscape gardeners did work for her in the winter months. The Board explained that the letter was "helpful, but its value was limited in that it failed to demonstrate that the off season work that it described was characteristic of the ongoing general pattern of the Employer's business." *See also Susan Cardinale*, 1997-INA-48 (June 12, 1998).

A logical inquiry as to whether a job constitutes full time employment encompasses the hours to be worked and the duties to be performed. We have not sought to foreclose the CO from making such inquiries in any occupation other than domestic cook. Because domestic cook cases have become vexing to the Board we cannot deprive the CO of a legitimate area of inquiry under the regulations.

Full time employment generally contemplates a work week of approximately 40 hours. Of course an employer may show that the usual work week in a given occupation is more or less than 40 hours. The Board should allow the CO to apply his or her expertise and common sense in this area. *See United States v. Marchand*, 654 F. 2d 983, 1000 (2nd Cir. 1977); *Achilles v. New England*

Tree Expert Co., 369 F. 2d 72, 73 (2nd Cir. 1966). There is nothing in this record or in any other case which has been before the Board which indicates that full time domestic cooks do not generally work approximately 40 hours a week.

A CO may require an employer to furnish work schedules, prospective menus and other details about the job including the number of persons in the household, etc. *Marguerite Gorman*, 1995-INA-672 (August 25, 1997); *Dr. Daryao S. Khatri*, 1994-INA-016 (Mar. 31, 1995). In many instances these inquiries have ferreted out the fact that the employer has not offered full time employment. *Arturo Rosales*, 1997-INA-129 (July 1, 1998); *Marguerite Gorman, supra*; *Dr. Daryao S. Khatri, supra; Mr. & Mrs. Clifford Cummings*, 1994-INA-008 (Dec. 21, 1994); *Marianne Tamulevich*, 1994-INA-054 (Dec. 5, 1994). In other instances the CO and employer have engaged in disputes about the reasonableness of the times allotted to various tasks. Where the CO has acted arbitrarily, the Board has reversed or remanded. *Anita Kirschner*, 1995-INA-682 (January 30, 1998); *Alice Rog*, 1995-INA-679 (Sept. 30, 1997); *Bartosz Strojek*, 1995-INA-633 (May 30, 1997). While this procedure does not provide a formula for adjudicating domestic cook cases, I am of the opinion that it is the correct procedure under the regulations.

I dissent in this case because I am of the opinion that the CO properly found that the Employer failed to establish that the job opportunity is for full time employment. As the majority opinion in *Carlos Uy III*, *supra*, notes, the burden of proof in an alien labor certification proceeding is on the Employer. In this case the Notice of Findings ("NOF") questioned whether the job constituted full time employment and requested specific information about the meals to be prepared, the duties of the job, the schedules for members of the household and other relevant inquiries. (AF 2-3). Employer filed a three page rebuttal which responded generally, without specificity, to the NOF. (AF 57-59). In the Final Determination ("FD") the CO found that Employer failed to establish that the job was for a full time position. (AF 2-3). The CO stated:

> Employer's daily time estimate of cooking preparation and shopping for foodstuffs consists of a five and one half hour day. It is not clear that Cook will prepare breakfast for employer's husband since his work schedule is Monday - Friday from 8:00 a.m. to 7:30 p.m. and the Cook's schedule is from 8:00 a.m. to 4:00 p.m. It is not clear that cook prepares lunch for employer's spouse either since he is away from the household during lunch time. Employer's estimate is excessive and unrealistic in the context of a four person family which includes one small child and one infant, when spouse appears absent for breakfast and lunch. The preparation of breakfast and lunch for employer and a three year old child and an infant does not constitute full-time employment even if an occasional guest is included. In general, employer's submitted schedule is not realistic to support a permanent full-time position.

(AF 2).

Unlike *Carlos Uy III*, *supra*, the CO in this case set forth the specific reasons upon which she found that Employer had not established that the job was a full time position. Examination of the Appeal File, including the sparse rebuttal filed by Employer, leads to the conclusion that the CO

properly determined that Employer had not met her burden of proof and established that the job was a full time position as required by Section 656.3. I would affirm the CO and deny certification.